BEFORE THE WORKERS COMPENSATION APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY SPHABMIXAY	)	
Claimant	)	
V.	)	
	)	
RUBBERMAID, INC.	)	Docket No. 1,062,740
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY[1]	)	
Insurance Carrier	)	

ORDER

Claimant requested review of Administrative Law Judge Gary K. Jones' June 25, 2014 Award. The Board heard oral argument on October 22, 2014.

APPEARANCES

Michael L. Snider, of Wichita, appeared for the claimant. Terry J. Torline, of Wichita, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the Award's stipulations.

ISSUES

Claimant alleged lung disease from chemical, fume, vapor and dust exposure at respondent's plant between 2009 and January 26, 2012. The judge ruled claimant did not meet with disability by occupational disease and any alleged occupational disease did not arise out of and in the course of claimant's employment. The judge also found claimant proved timely written notice and brought his claim within one year of his disablement, and equitable estoppel did not bar claimant's workers compensation claim.

Claimant requests the Award be reversed, arguing he proved either that repeated occupational exposure to chemical irritants, dust and fumes while working for respondent caused his lung condition, or at least caused a worsening of his lung condition. Claimant contends he is permanently and totally disabled.

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[1] Respondent counsel stated his client is self-insured. (See R.H. Trans. at 4-5, 8).

Respondent maintains the Award should be affirmed. Respondent contends claimant's asthma is not causally related to his employment and is an ordinary disease of life. Respondent also challenges the judge's findings regarding written notice, timely claim and equitable estoppel.

The issues for the Board's review are:

1. Did claimant prove a compensable occupational disease arising out of and in the course of his employment with respondent?

2. What was claimant's date of disablement?

3. Did claimant prove timely written notice within 90 days of his date of disablement?

4. Did claimant prove he filed claim within one year of his date of disablement?

5. Does the prevailing factor standard apply to occupational disease claims?

6. Is claimant's claim barred by the doctrine of equitable estoppel?

7. Was claimant's denial of benefits an unconstitutional deprivation of equal protection and due process of law?[2]

FINDINGS OF FACT

Claimant immigrated from Laos in 1980 or 1981. Laotian is claimant's primary language. English is his second language. Claimant testified he is able to read and understand "some" written English.[3]

In 1984, claimant began working 12-hour shifts as a production operator for respondent at its Winfield, Kansas plant. His work schedule was two days on and three days off, followed by three days on and two days off. While a cigarette smoker from 1971-1976, claimant denied any breathing or allergy problems prior to going to work for respondent and testified his preemployment physical did not reveal asthma. He has not worked anywhere else after coming to the United States.

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[2] Claimant raised constitutionality arguments to the judge. While claimant's Application for Review listed an issue concerning whether a denial of benefits under the occupational disease laws resulted in unconstitutional violations of equal protection and due process of law, no such assertions were made to the Board, either in brief or at oral argument. A point incidentally raised, but not adequately argued, is abandoned. See *Herrell v. Nat'l Beef Packing Co., LLC,* 292 Kan. 730, 736, 259 P.3d 663 (2011).

[3] R.H. Trans. at 23; see also Claimant Depo. at 13-14.

Claimant's primary care physician is John Mark Winblad, M.D., a family practice physician for 30 years who works at Winfield Medical Arts, P.A. The majority of Dr. Winblad's records were generated by physician assistants. All physician assistants or nurse practitioners referenced below worked at Dr. Winblad's office.

On January 13, 2003, claimant saw Mark Thomas, PA-C, for a persistent headache. Physical examination revealed claimant's lungs were clear. Claimant had no listed allergies.

On January 13, 2004, claimant saw Mr. Thomas for a non-productive cough and wheezing. Physical examination revealed claimant's lungs were coarse with scattered rhonchi and wheezes. Mr. Thomas diagnosed claimant with asthmatic bronchitis. As claimant did not want an inhaler, Mr. Thomas prescribed Singulair.

On March 16, 2006, claimant saw Tirzah Rice, PA-C, for complaints of coughing and wheezing, which were worse in cold weather and at night. Claimant reported being previously diagnosed with asthma and using the medication Armatine. Physical examination revealed intermittent inspiratory wheezes. Ms. Rice diagnosed claimant with asthma. Ms. Rice recommended discontinuance of Armatine and prescribed an albuterol inhaler and Singular.

On January 30, 2008, claimant saw Deb Schrag, PA-C, seeking a refill of his albuterol inhaler. Claimant reported using Primatene Mist, which did not relieve his cough. Ms. Schrag noted cold weather exacerbated claimant's cough. Claimant reported a past medical history of some asthma. Claimant was diagnosed with subjective wheezing and cough. Ms. Schrag refilled the albuterol inhaler.

On February 13, 2008, claimant returned to Ms. Schrag complaining of cough and wheezing. He sought another refill of the albuterol inhaler. A chest x-ray revealed mild bilateral interstitial infiltrates. A spirometry test showed moderate restriction. A pulmonary function test revealed a mildly obstructive respiratory pattern. Claimant was diagnosed with asthma and counseled regarding overuse of the inhaler. Ms. Schrag switched claimant to Combivent, as well as refilled his Singulair prescription. Ms. Schrag noted:

> In reviewing the patient does not smoke nor has he smoked. He is not particularly exposed to secondhand smoke. He currently works at Rubbermaid and is exposed to some plastics but otherwise no smoke or other environmental that he is able to recall at this time.[4]

[4] Winblad Depo., Ex. 2 at 6.

On April 27, 2009, claimant saw Dr. Winblad for complaints of heart palpitations, in addition to intermittent shortness of breath and wheezing. Claimant said his mother told him he had asthma or an asthma-like condition as a child.[5] Claimant's lungs were clear throughout with no rales, rhonchi, wheezes or rubs. A chest x-ray showed no acute changes. Claimant was diagnosed with palpitations and asthma by history. Dr. Winblad refilled claimant's albuterol inhaler and recommended a pulmonology consult.

On May 15, 2009, claimant returned to Dr. Winblad for complaints of wheezing both at work and shortness of breath at night. Claimant said his medication provided little relief. Claimant's lungs had tight wheezes bilaterally on expiration, but no rales, rhonchi or rubs. Dr. Winblad suspected claimant had a significant asthma attack. A spirometry test showed reversible airway obstruction with treatment. Dr. Winblad diagnosed claimant with asthma. Dr. Winblad discontinued the Combivent and prescribed Advair, Ventolin, prednisone and a nebulizer machine. Claimant was scheduled to see Nader Eldika, M.D., a pulmonologist.

Claimant returned to Dr. Winblad on June 29, 2009, with an asthma flare-up. Claimant reported using his albuterol inhaler, but was not using Advair as directed. Claimant did not keep his appointment with Dr. Eldika. Claimant was provided an albuterol treatment, which provided relief. Dr. Winblad diagnosed claimant as having an acute asthma attack. He prescribed Pulmicort until the asthma was under control. Claimant was also instructed to use an albuterol machine and was prescribed prednisone. Claimant was to return to Advair once he felt better.

On August 13, 2009, claimant saw Dr. Eldika. Such physician did not testify in this case. Dr. Eldika's opinions are not in evidence.[6]

On October 21, 2009, claimant saw Ms. Schrag for follow-up on his asthma. Claimant had been out of his asthma medication for a while and had been coughing and wheezing. Physical examination revealed some end expiratory wheezes heard throughout with no rales or rhonchi. Ms. Schrag assessed claimant with asthma and wheezing. Ms. Schrag refilled the albuterol and Pulmicort. Ms. Schrag noted, "I discussed with him the importance of staying up on his refills and having his medications readily available to him."[7]

On November 15, 2009, claimant, due to acute hypoxic respiratory failure secondary to acute asthma exacerbation, was hospitalized and put on a ventilator for several days.

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[5] Claimant denied this information. (Claimant's Depo. at 8).

[6] Additionally, respondent counsel objected to Dr. Eldika's reports and opinions as medical hearsay, as with any medical hearsay contained in Winblad Exs. 2 & 3. (See Winblad Depo. at 27, 43, 53; Leeds Depo. at 7, 49; Parmet Depo. at 21-24, 29-30, 33-35, 38, 91, 93; Claimant Depo. at 55; R.H. Trans. at 36, 46).

[7] Winblad Depo., Ex. 2 at 16.

On November 23, 2009, claimant told Dr. Winblad about his recent hospitalization. Dr. Winblad noted claimant had fatigue, weakness and shortness of breath. Claimant had some lung wheezing bilaterally, but no rales, rhonchi, rubs, tachypnea or retractions. Spirometry testing showed severe restriction. Dr. Winblad diagnosed claimant with severe asthma, recent hospitalization for acute respiratory failure with residual fatigue and persistent shortness of breath. Dr. Winblad noted, "[claimant] definitely doesn't feel like he is able to do his job. He can't walk around and climb stairs without getting short of breath."[8] Dr. Winblad took claimant off work until December 10, 2009.

On November 30, 2009, claimant returned to Dr. Winblad with complaints of intermittent cough and shortness of breath on exertion. Claimant reported not feeling strong enough to return to work. Claimant's lungs were clear. Dr. Winblad diagnosed claimant with asthma. Due to claimant's reported frustration over returning to work, Dr. Winblad obtained an earlier appointment with Dr. Eldika to determine work status.

On February 24, 2011, claimant returned to Dr. Winblad for a physical. Claimant noted significant problems with asthma, in addition to episodes of throat tightening after eating lobster, crabs, clams and shellfish, which required use of inhalers and breathing treatments. Claimant's lungs were clear with no cough, shortness of breath or wheezing. In addition to claimant's medications of Atrovent, Foradil Aerolizer and Pulmicort, Dr. Winblad prescribed albuterol for his nebulizer and a refill of the albuterol inhaler. Dr. Winblad suggested claimant consult with an allergist, but claimant wavered on such offer.

In July 2011, claimant was hospitalized for respiratory failure. He was diagnosed with chronic obstructive pulmonary disease (COPD). He remained in the hospital for four days. Thereafter, on or around July 12, 2011, claimant submitted an Employee Disability Statement requesting short-term disability benefits. The form states claimant's asthma was not caused by work and claimant did not intend to file a workers compensation claim. Claimant contended someone else at Rubbermaid filled out the form, but he made sure all of the information was correct before he signed and dated it.

On July 13, 2011, claimant was seen by Lynnetta Ward, ARNP. Claimant reported being hospitalized for exacerbation of his allergy symptoms. Ms. Ward noted, "[h]e works at Rubbermaid in extreme heat and with plastic fumes. He cannot breathe under these conditions."[9] Claimant's lungs showed claimant had scattered expiratory wheezes bilaterally diffusely. Claimant was diagnosed with asthma exacerbation and provided an off work slip because he "cannot work in the heat/humidity and fumes at this time."[10] Ms. Ward provided prescription refills for Symbicort, Proair HFA, Ipratropium and albuterol.

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[8] *Id*., Ex. 2 at 17.

[9] *Id*., Ex. 2 at 25.

[10] *Id*., Ex. 2 at 26.

On July 19, 2011, L. Herlocker, MA, issued a note stating:

> I spoke with Gary and explained to him that it was very important that he keep up on his follow-up appointments. I have asked him to see Dr. John Winblad or his PA Lynnetta Ward every 3 to 4 months (or sooner if needed) for medication follow-up and monitoring. He states that he understands and will do so.[11]

On August 26, 2011, claimant returned to Ms. Ward for follow-up regarding his asthma. He reported improvement in his asthma and asked to return to work. He reported his asthma triggers were unknown, but he believed some tree pollens were triggers. He also reported occupational exposure to respiratory irritants. Physical examination revealed claimant's lungs were clear. Ms. Ward released claimant to return to work on September 6, 2011 with no restrictions and cautioned him to avoid passive smoke exposure and minimize exposure to factors which cause exacerbation of symptoms. Ms. Ward noted, "We did discuss that there are plastic fumes in his place of employment and he may not be able to continue working there if it flares his asthma back up."[12] Claimant was provided a prescription for Advair.

Claimant received short-term disability benefits until September 6, 2011. On that day, he returned to work for a short period of time before being laid off until January 2012.

On November 8, 2011, claimant saw Anand Kaul, M.D. A chest x-ray showed bilateral perihilar infiltrates with a component of peribronchial cuffing. Dr. Kaul noted claimant was a long-term reformed smoker who has worked in the dust. Physical examination revealed a crackle right base in the lungs. Dr. Kaul diagnosed claimant with: (1) right lower lung early pneumonia; (2) bronchial asthma; and (3) some COPD. Blood tests were ordered.

On November 17, 2011, claimant saw Chandy Samuel, M.D., for follow-up for his asthma and bronchitis. While claimant reported feeling better, he still experienced some shortness of breath on exertion and minimal cough. On physical examination, claimant's lungs had fair air entry with a few scattered rhonchi. Dr. Samuel recommended continued use of inhalers and a follow-up with Dr. Winblad.

Claimant returned to work on January 4, 2012 and worked four days before leaving due to "[f]our days coughing and shaking chills."[13] January 10, 2012 was claimant's last physical day of work with respondent.

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[11] *Id*., Ex. 2 at 27.

[12] *Id*., Ex. 2 at 29.

[13] *Id*. at 5-6, 8; see also back of first page of Ex. 1.

On January 13, 2012, claimant returned to Dr. Winblad and reported significant problems with severe asthma and chronic bronchitis. Dr. Winblad noted claimant's work for respondent can expose him to fumes and sometimes extreme temperature changes which are bad for an asthmatic. Claimant told Dr. Winblad he returned to work at the beginning of the month and his asthma was so bad within days that he was unable to do his job. Claimant's lungs revealed coarse upper bronchial sounds and bilateral wheezes, but no definite rhonchi or rales. Dr. Winblad stated:

> Gary is talking like he is concerned that the severity of his Asthma is getting so bad that he is not able to function safely [at] work anymore. He said that he just [tries] to go to work and tires out quickly and gets very SOB and Exhausted.[14]

Dr. Winblad recommended claimant discuss long term disability with Dr. Eldika. Dr. Winblad took claimant off work until seen by Dr. Eldika on January 25, 2012.

On January 26, 2012, claimant had a follow-up with Dr. Winblad and reported "that when he is off work his asthma is well controlled but when he is working at Rubbermaid he has [flares] of his asthma."[15] Claimant's lungs were clear with no wheezing, rhonchi or rales. Dr. Winblad asked an assistant to write claimant an off work note.

On or around January 27, 2012, claimant provided a letter from Dr. Eldika to respondent's secretary and testified he provided notes indicating he was treating for asthma and/or shortness of breath to respondent "every time."[16] Claimant testified respondent gave him short term disability paperwork to complete and did not mention anything about filing a workers compensation claim.

On January 31, 2012, claimant completed, signed and dated a second Employee Disability Statement for short-term disability benefits. Claimant indicated his asthma was not caused by work and he did not intend to file a workers compensation claim.[17] Claimant received $7,285.71 in short-term disability benefits until September 2, 2012.

On March 12, 2012, claimant returned to Dr. Winblad complaining of shortness of breath at night. Dr. Winblad noted claimant was no longer working. Physical examination revealed claimant's lungs were clear with no wheezing, rhonchi or rales. At that time, claimant could only register 200 liters of air per minute. Dr. Winblad indicated claimant should have been able to do a minimum of 400 liters per minute.

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[14] *Id*., Ex. 2 at 33.

[15] *Id*., Ex. 2 at 34.

[16] R.H. Trans. at 29.

[17] Claimant Depo., Ex. 3.

On June 8, 2012, Shannon Jamerson, FNP, evaluated claimant for a persistent cough lasting three days. On examination, claimant's lungs were clear. Ms. Jamerson prescribed medication. He returned to Ms. Jamerson a week later and reported improvement. Ms. Jamerson diagnosed claimant with asthma (exacerbation resolved).

Claimant resigned his position in September 2012, citing "medical reasons - asthma."[18] He also applied for social security disability benefits.

On October 11, 2012, claimant filed an Application for Hearing alleging "lung disease, breathing disorder and occupational asthma" from exposure to fumes, dust and chemicals at respondent's factory from 2009 through January 26, 2012.

On February 27, 2013, claimant was seen at his attorney's request by William M. Leeds, D.O., a pulmonologist who is board certified in general medicine, pulmonary, critical care and sleep medicine. Dr. Leeds noted claimant inhaled fumes, chemicals and heat while working for respondent. He noted asthma was part of claimant's past medical history. Dr. Leeds wrote claimant smoked cigarettes, but quit in 1976. Dr. Leeds reviewed claimant's medical records, took a history and examined him. Claimant had diminished breath sounds with wheezing bilaterally. Dr. Leeds administered pulmonary function studies. Dr. Leeds noted claimant had "an element of allergy noted with mountain cedar exposure . . . ."[19] In comparing claimant's 2009, 2011 and 2013 pulmonary function studies, Dr. Leeds noted, "[t]here has been a significant severe impairment in pulmonary function from . . . that has progressively worsened."[20] Dr. Leeds' impression was claimant had dyspnea with exertion related to severe chronic obstructive physiology. Dr. Leeds stated:

> This impairment is minimally related to his tobacco use. At this point, he has less than a 5-pack-year history of cigarette usage and his dyspnea did not become prominent until approximately 2007. It progressed at that time and was clearly exacerbated by his chronic exposures to dust, fumes and chemicals.[21]

On March 19, 2013, Dr. Leeds assigned an 85% "disability"[22] pursuant to the AMA *Guides*, 4th Edition,[23] (hereafter *Guides*) which he attributed to claimant's employment.

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[18] Hopkins Depo., Ex. 9-A at 3. Exhibit 9-A was not offered into evidence and an associated Exhibit 9 was not offered into evidence at the Brandi Biddle Deposition.

[19] Leeds Depo., Ex. 2 at 2.

[20] *Id*., Ex. 2 at 2.

[21] *Id*., Ex. 2 at 2.

[22] *Id*., Ex. 3.

[23] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides* unless otherwise noted.

Claimant testified by deposition on April 11, 2013. In describing what he believed caused his pulmonary problems, claimant testified:

> Q. Just so I am clear, do you contend that by breathing the fumes caused by the burning oil around machine number 39 that is what caused your problem?
>
> A. Yes, I got some already, but that day it just get worse. That day have to be worse. So I guess I have some symptom already, but when I smell that fume, it just make it worse.
>
> . . .
>
> Q. Is there anything else that occurred at work that you contend caused you to have problems?
>
> . . .
>
> A. One particular area, when I go work in the packout, it is kind of bigger size. It is about 8 feet and heavy. Too heavy, yeah. Really, really heavy.
>
> Q. What about that?
>
> A. That one is more - - a lot of plastic wrap that got burned and it is just more stinkier, smell a lot worser. Like I said, I heard the rumor they removed that particular product or whatever. But, of course, I haven't been there for year. But that is what happened. Everybody talk about this aching all over the body, and they remove that part.
>
> . . .
>
> Q. Is there anything else that you contend happened at work that caused you to have pulmonary problems?
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> A. I think one of them is when I work with machine they call injection mold. Sometime the tech is not fixing properly and the smell, it is just getting - - every time that happens, when we call them to report, but by the time they come to fix, it takes at least 30 minutes or so. Then, of course, we are breathing and smelling that.
>
> Q. What about the injection mold was causing problems that you contend?
>
> A. I think this is during the process of when we inject the product in there and the steam, the heat produce the fume and everything come out and make a bad smell. That is when that occurred.
>
> . . .

Q. Is there anything else that you contend occurred at work that caused your pulmonary problems?

A. The foam.

. . .

Q. Is there anything else that you contend occurred at work that caused your pulmonary problems?

A. Okay, one more area, that is when we do the hot tail, the regrinding. It kind of stuck and it just grinding and that is when the burn, the smoke come out, smell bad. This is once in a while that happen.[24]

Brandi Biddle, respondent's human resources manager since January 11, 2011, testified on May 22, 2013. Ms. Biddle indicated Newell Rubbermaid is the corporate headquarters and respondent operates under Rubbermaid, Inc., which is a self-insured. Between December 2011 and July 2012, Ms. Biddle oversaw both human resources and safety for respondent. Ms. Biddle provided safety training in January 2012, which claimant would have attended. Such training included incident reporting procedures, information about how to obtain a MSDS (material safety data sheet) for chemicals and personal protection equipment. Ms. Biddle testified this policy is also posted in the handbook communication, the monthly safety training communication and the safety refresher communication. Additionally, Ms. Biddle indicated respondent posted six bulletins throughout the plant explaining employee rights under the Workers Compensation Act.[25]

Ms. Biddle testified she first became aware claimant was alleging a work-related condition when she received claimant's written claim on October 12, 2012. Since working at the plant, Ms. Biddle has not heard of an employee developing asthma or having breathing difficulties as a result of working around the machinery.

Julie Hopkins, respondent's human resources representative since 1987, testified on May 22, 2013. Ms. Hopkins testified an employee's work-related complaints are referred to a safety leader and a worker's personal conditions are referred to the human resource service center. Ms. Hopkins testified she never referred claimant to a safety leader because "he never indicated that I should do such."[26] She testified any documentation brought in by claimant was sent to the third-party administrator at claimant's request.

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[24] Claimant Depo. at 25-32. Claimant also testified at the Regular Hearing that he saw fumes coming out of a blow mold machine and smelled an odor from a machine.

[25] Biddle Depo., Ex. 10.

[26] Hopkins Depo. at 20.

Wayne Ramsey testified on May 22, 2013. Mr. Ramsey has worked for respondent since 2004 and been the safety leader since July 1, 2012. Mr. Ramsey testified iSi Environmental, an environmental company, comes in every three years to test air quality for carbon monoxide and isocyanate, a common workplace chemical associated with asthma. The last testing was performed in October or November 2012. Mr. Ramsey testified when iSi Environmental is testing for isocyanate levels, they put air samplers "directly on the foamer that is foaming at the station."[27] According to Mr. Ramsey, isocyanate flows through a foam line.

Mr. Ramsey testified he never saw claimant using a nebulizer or inhaler. While Mr. Ramsey may have been told in passing that someone had asthma, he could not remember and he was unaware of anybody at the facility having respiratory problems or occupational asthma. He has not had any employee complain about a machine emitting fumes.

Dr. Winblad hand-wrote a response on claimant's attorney's May 22, 2013 letter regarding claimant's asserted disability from occupational asthma. His response was, "I am not qualified to render an opinion on permanent total disability (and the percentages of it attributed to) from occupational asthma."[28]

At claimant's attorney's request, Dr. Leeds ordered a blood test for claimant on August 7, 2013. The test was to determine if claimant had evidence of exposure to isocyanates. The test was negative.[29]

Constance Timmons testified on September 24, 2013. Ms. Timmons has been an industrial hygienist since 1980. In 1994, she started worked for iSi Environmental, a company that does environmental testing and consulting, including industrial hygiene, environmental exposures, indoor air quality and asbestos. Ms. Timmons tested respondent's facility for isocyanate in 2003, 2004, 2005, 2007 and 2009. Ms. Timmons testified no isocyanate levels were found above limits set by OSHA and the American Conference of Governmental Industrial Hygienists. In describing the protocol used when testing levels at respondent's facility, Ms. Timmons testified:

> A. When they would ask me to come out, I would call the laboratory and ask them to send me sample media, because it's only good for 60 days. So they would ship me the media. I would take it out in a cooler; I would take a box of carbon monoxide diffuser tubes because they're a direct reading - - direct reading tubes and a noise meter.

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[27] Ramsey Depo. at 17-18.

[28] Winblad Depo., Ex. 3 at 1.

[29] Leeds Depo. at 26-27 and Ex. 4.

Q. And if you want to, you can just focus in on the isocyanates because I'm not really interested in the other parts.

A. Okay. When I got there, whoever was my representative there would go with me and designate who to sample. Typically it was the operator - - an operator at each of the stations that were operating that were running at the time. People rotate there so they're not all doing the same thing; it's to keep them from getting tired of the same job and ergonomic issues. But we would select the operator at each one of those, because OSHA defines a ceiling limit for isocyanates or for MDI, we only take a 15-minute sample.

Q. What do you mean ceiling limit?

A. You can have exposure standards based upon a full shift, eight hours that you can be exposed to a certain amount for a full work day, or you can be exposed - - you're never supposed to be exposed above a ceiling for any time during the day. So in order to get that ceiling limit, which is what OSHA defines for isocyanates, I take a 15-minute sample. Instead of putting a pump on them all day, that's why they're only 15 minutes.

. . .

A. Once we would decide who to sample, I would put a pump on them, and these pumps are about, oh, six inches tall; they pull the air through the cassette. Before I leave, I set the pump for how much I want it to pull. According to the methodology, it wants it to run at one liter a minute. So I put it on the person and run the pump for 15 minutes approximately. You can't always get exactly 15 minutes because they might be in the middle of something when 15 minutes hits. And then I take the cassette and the pump away from them, put my cassette back into the cooler, and we go on to the next one.

Q. And you test all six or however many people - -

A. However many they define they want me to sample.

Q. Okay. And then at the conclusion of your testing, then what happens?

A. I post calibrate my pump to see if it's still running at one liter a minute, write a chain of custody, and ship the samples in a cooler back to the lab for analysis.[30]

[30] Timmons Depo. at 57-60

While Ms. Timmons acknowledged she would expect more isocyanate in the area where the foam is actually expanding, she did not test those areas because"nobody works right where the isocyanate is injected."[31]

Brent Hubble testified on September 25, 2013. Mr. Hubble works as a technical supervisor for respondent. Mr. Hubble testified that in 2006, there was an increase in the number of machines respondent used to produce parts from approximately 50 machines to approximately 60 or 65 machines. These machines consisted of the blow mold which creates the outer plastic covering, the injection mold which creates the inner part, as well as the foaming table which joins the two pieces together.

In describing the blow mold process, Mr. Hubble testified plastic is heated to "[a]bout 400 degrees."[32] The machine then shoots the plastic down, the press comes together and air is blown through it to form a part. Mr. Hubble indicated any exhaust that occurs during this process travels through the parison[33] and comes out under the "head" at the top of the machine.[34] Once the machine releases the part, an employee trims excess plastic.

From 2006 until July 2011, Mr. Hubble was claimant's supervisor. During the time Mr. Hubble supervised claimant, he was not aware of any time that claimant missed work because of breathing problems nor does he recall ever seeing claimant use an inhaler on the job. Mr. Hubble became aware claimant was having breathing problems at work during the summer of 2010, when he came up to claimant's car and saw him using a breathing machine plugged into the cigarette lighter. He testified he asked claimant about it and claimant told him, "it was just breathing treatments, it was asthma." When asked if it was work-related, claimant told him "no."[35] Mr. Hubble indicated he reported the "unusual circumstance" to the human resources manager who said "as long as he's taking his treatments on break, that's fine."[36]

Mr. Hubble is not aware of any other employees under his supervision who have suffered from asthma while working for respondent. He did not notice any unusual, untoward or stinky smells at the plant. He testified robots handle isocyanates in sealed systems.

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[31] *Id*. at 25.

[32] Hubble Depo. at 25.

[33] According to dictionary.com, a parison is a hollow tube of plastic to be formed into a hollow object, as a bottle, by blow molding.

[34] Hubble Depo. at 28. The "head" is not defined in the record.

[35] *Id*. at 12.

[36] *Id*. at 16.

Mr. Hubble testified two main resins – polypropylene and polyethylene – are used to make plastic products at the plant. The polypropylene resin MSDS states, "[n]o adverse effects are anticipated from single exposure to dust. Vapors/fumes released during thermal processing may cause respiratory irritation."[37] The MSDS states an approved air-purifying respirator should be used when vapors are generated at increased temperatures or when dust or mist is present. Depending on temperature, air supply and presence of other materials, the MSDS states processing may release fumes and other decomposition products. "At temperatures exceeding melt temperatures, polymer fragments can be released. Fumes can be irritating. Decomposition products can include and are not limited to: Aldehydes. Alcohols. Organic acids. Decomposition products can include trace amounts of: Hydrocarbons."[38] Test data on melt temperature was not available.

The MSDS on Marlex/Marflex polyethylene resin states, "[t]he dust from this material may cause respiratory irritation. If this material is heated, fumes may be unpleasant and produce nausea and irritation of the upper respiratory tract."[39] It also states formaldehyde may be produced at elevated temperature and dust may produce mechanical irritation to the mucous membranes of the eyes, nose, throat and upper respiratory tract. Page four of the MSDS cautioned against breathing vapors or fumes which may be released during thermal processing. While the MSDS states respiratory protection is normally not required, if exposed to "vapors or fumes that are not adequately controlled by ventilation, wear a NIOSH approved respirator. Use the following elements for air-purifying respirators: Organic Vapor and Formaldehyde."[40] The MSDS for the polyethylene resin states:

> At extrusion temperatures (>350F, >177C), polyethylenes can release vapors and gases, which are irritating to the mucous membranes of the eyes, mouth, throat, and lungs. These substances may include acetaldehyde, acetone, acetic acid, formic acid, formaldehyde and acrolein. . . . Following all recommendations within this MSDS should minimize exposure to thermal processing emissions. Potentially toxic/irritating fumes may be evolved from heating material.
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> . . .
>
> During thermal processing (>350F, >177C) polyolefins can release vapors and gases (aldehydes, ketones and organic acids) which are irritating to the mucous membranes of the eyes, mouth, throat, and lungs. Generally these irritant effects are all transitory. However, prolonged exposure to irritating off-gases can lead to pulmonary edema.[41]

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[37] *Id*., Ex. 5 at 1.

[38] *Id*., Ex. 5 at 4.

[39] *Id*., Ex. 6 at 2.

[40] *Id*., Ex. 6 at 5.

[41] *Id*., Ex. 6 at 4, 6.

Dr. Winblad testified on October 30, 2013. He testified he referred claimant to Dr. Eldika because he was unsure if claimant had asthma and was concerned claimant's medication could be exacerbating his condition.

Dr. Winblad testified asthma is an "ordinary disease of life" and can affect all different types of individuals including young and old, male and female, different races.[42] He testified he is not an occupational asthma expert.

Peter Rodriguez testified on November 20, 2013. Mr. Rodriguez was the environmental health and safety leader for respondent from approximately May 2010 until December 2011. His job involved taking care of all the day-to-day aspects of safety as far as any supervisor reports on someone getting hurt, monitoring the safety management systems and performing annual plant safety presentations.

Mr. Rodriguez was familiar with isocyanate being used at respondent's plant because it was one of the chemicals that could be a significant hazard. He indicated respondent warned employees to wear appropriate personal protective equipment when working with chemicals such as safety glasses, gloves and steel-toed shoes. Mr. Rodriguez testified hazards related to breathing fumes was "not a concern"[43] and there was no respiratory program in place because there "wasn't one required."[44]

Mr. Rodriguez was not aware of any employees having breathing problems or that claimant had a prescription to use a nebulizer while at work. Mr. Rodriguez testified, "[i]t's like I said earlier, this is all kind of news to me, because it wasn't even on the radar."[45]

Dr. Leeds testified on January 29, 2014. Dr. Leeds testified he only saw claimant once. Dr. Leeds testified claimant had severe impairment in his ability to move up air which is called obstructive physiology. He related such impairment to an "occupational etiology."[46] In addressing causation, Dr. Leeds testified:

> From reviewing the records I felt that his exposure to a multiplicity of chemicals, vapors and fumes at his workplace was the proximate cause of his respiratory problem.[47]

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[42] Winblad Depo. at 55.

[43] Rodriguez Depo. at 17; see also pp. 25-26.

[44] *Id*. at 28.

[45] *Id*. at 35.

[46] Leeds Depo. at 7-8.

[47] *Id*. at 7.

Dr. Leeds testified claimant has an ongoing deterioration in lung function due to repeated chemical exposure in the workplace. He testified:

> [T]his gentlemen had extensive exposure, according to the record, to multiple chemicals and vapors and fumes, any of which could cause this chain of events, an inflammatory process in the airways, and that process can be arrested but it can also be progressive and it certainly can be exacerbated by further exposures.[48]

Dr. Leeds testified his opinion that claimant's condition was due to occupational exposure was premised on the "record" establishing claimant was exposed to multiple chemicals, vapors and fumes, and that any such chemicals, vapors and fumes could cause claimant's condition, which could be progressive and could be exacerbated by further exposures.[49] According to Dr. Leeds, the "record" was "Work at the Rubbermaid plant."[50]

Dr. Leeds testified claimant's 85% impairment of function was based on a specific chart in the *Guides*.[51] Dr. Leeds testified claimant was forced to leave work for safety reasons. He testified any kind of significant exposure could kill claimant. Dr. Leeds opined claimant is unlikely to be able to obtain gainful employment. Dr. Leeds agreed the prevailing factor in causing claimant's impairment and disability was his ongoing workplace chemical exposure.

Dr. Leeds acknowledged he evaluated claimant to assist in his workers compensation claim, he has never been to respondent's plant, he did not conduct testing to determine what chemicals, vapors or fumes may be present at respondent's facility, and while he had the two MSDS, he had no industrial hygienist reports as to specific chemicals, vapors or fumes at respondent's facility.

Dr. Leeds testified his opinion was based on claimant having extensive work exposure to chemicals, including "organic chemicals, polymers that require catalysts and of course organic chemicals, petro chemicals, to form their products . . . ."[52] Without having a list of the chemicals to which claimant may have been exposed, Dr. Leeds could not specify what chemicals caused claimant's condition, noting any or all of the chemicals

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[48] *Id*. at 10.

[49] *Id*. at 10.

[50] *Id*. at 11.

[51] *Id*. at 8. Dr. Leeds did not apportion 85% of claimant's asthma to occupational exposures and 15% to some other cause.

[52] *Id*. at 18.

could have been the "culprit."[53] Dr. Leeds similarly could not identify the names of vapors to which claimant was exposed, other than "organic vapors."[54] He could not say what chemicals or quantity of chemicals to which claimant may have been exposed.[55] Dr. Leeds testified it would be "next to impossible" to test for the hundreds of chemicals that could be produced in the combustion process at respondent's plant.[56]

Dr. Leeds observed it was "certainly plausible" claimant was exposed to cleaning solvents and would be exposed to such solvents away from work as well,[57] as well as noting claimant's respiratory condition is exacerbated by non-work situations, such as breathing fumes while pumping gas, breathing asphalt fumes and being around dust anywhere. While agreeing claimant's condition will worsen due to vapor, fume, chemical and dust exposure in daily life, Dr. Leeds noted that once claimant's inflammatory process started, it would worsen.

Dr. Leeds further testified that the chemicals from the two MSDS identified at Mr. Hubble's deposition, the hotter the organic chemicals are heated, "if those were the chemicals that were formulated, they easily could cause permanent damage and be responsible for this man's problems without a doubt."[58]

Dr. Leeds testified claimant's diagnosis is COPD from asthma and claimant's COPD likely predated 2009. When asked if claimant's COPD was not due to his work for respondent, Dr. Leeds testified, "I - - I wouldn't agree with that. I have no reason not to think that the exposures that we're assuming didn't have something to do with his lung dysfunction."[59] His opinion was premised on claimant having worked extensively around chemicals and the probability such exposures were the most likely cause of his COPD.

At the time of the March 11, 2014 regular hearing, claimant was taking Symbicort and using a nebulizer about three times per day. As a result of his condition, claimant could only walk about two blocks before needing to use his inhaler. After leaving his employment on January 10, 2012, claimant has not been hospitalized for any respiratory condition, but still has difficulty breathing.

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[53] *Id*. at 19.

[54] *Id*. at 21.

[55] *Id*. at 22, 25.

[56] *Id*. at 45.

[57] *Id*. at 22.

[58] *Id*. at 43; see also p. 45.

[59] *Id*. at 24.

On April 22, 2014, claimant was seen at respondent's request by Allen Parmet, M.D, who is board certified in occupational and aerospace medicine and has over 35 years' experience in occupational respiratory issues. Claimant reported his problems began in 2009 when he had chest pain and difficulty breathing after smelling burning plastic at work. Claimant reported some tree and shellfish allergies. Dr. Parmet reviewed some medical records, including multiple pulmonary function studies, reviewed depositions, reviewed the MSDS, took a history and performed a physical examination. Claimant's chest was clear to percussion with inspiratory wheezes scattered throughout the entire chest region.

Dr. Parmet noted claimant's asthma was severe, could not be controlled and his pulmonary function was severely changed. Dr. Parmet diagnosed claimant with asthma which caused COPD.[60] Dr. Parmet indicated claimant clearly had untreated asthma for decades which led to his developing COPD. In addressing causation, Dr. Parmet stated:

> It is apparent that Mr. Sphabmixay's condition has persisted long after his exposure stopped. Therefore an occupational agent cannot be the cause of his condition. He is sensitive to common tree pollens which exist in our area and particularly notorious is Mountain Cedar, generally considered a nuisance tree, since it is not desirable as an ornamental bush and can cause persistence of asthmatic symptoms.
>
> The assertion that Mr. Sphabmixay developed occupational asthma cannot be supported. There are observations that Mr. Sphabmixay complained that he was irritated by work and indeed if there were release of the thermal decomposition products, I would anticipate that he would be irritated by them and his asthma would flare up, but this would also occur in a situation of noncompliance. That is, Mr. Sphabmixay did not consistently take his medications as prescribed and as noted in the medical documents. There is no objective evidence that he was specifically sensitized to any agent in the workplace.[61]

Dr. Parmet testified on June 9, 2014. In addressing causation, Dr. Parmet testified:

> I don't think he has occupational asthma.
>
> In terms of looking at the allergens in his environment, what causes the allergy is a protein of some kind, the body's response to a foreign protein. Although there are - - there's the odd agent; the technical term is a hapten. And that's a chemical agent that triggers this immune response.
>
> The only thing in his environment was isocyanate, and isocyanate's a very odd agent; because unlike all the others, when you withdraw it, the symptoms don't go away. So in that sense, it would be a suspicious agent here.

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[60] Parmet Depo. at 13.

[61] *Id*., Ex. 2 at 12-13.

There was isocyanate used at the facility, they tested for it, they would observe it to try and keep it below - - because it's regulated by OSHA. But it's also easy to test for isocyanates. And that is, you do an immune study to see if he has antibodies to isocyanate, and he doesn't.

. . .

There are tests that show that he's allergic to environmental pollens and things like weeds and mountain cedar.

. . .

Isocyanates are attacked by the lymphocytes and they form antibodies, and you can measure the antibodies in the bloodstream, so you need to do a blood test on that.

His blood test is negative. And while there's a group of isocyanates, they all cross-react. So if I see one, I see them all. You might have one particular one and it gives you a slightly lower to the others, but they all cross-react, and you just never get negatives. It's extremely easy to find.

And then he did another test looking at nitric oxide, which is a gas that's produced in the body in terms of inflammation. And Gary's nitric oxide levels are a little bit elevated. 40's the upper limit of normal, so there's inflammation going on. Well, okay, we knew that.

He's allergic to a lot of pollens and dust. All right. And he's not allergic to isocyanate. Those are the objective findings.

Now, the surmise that something else must have done it, you know, there must be a pony in here somewhere, sorry; that doesn't do it. When you look at Material Safety Data Sheets, there are specific chemical structures that we identify. That's what I do as an occupational doc.

I'm not finding the proteins that would be typically setting somebody off. There's no other haptens besides isocyanate.

In terms of chemical discomposition, you can't break these chemicals down. You can form acids, okay; acids are irritating, and they're irritating to everybody. People with asthma are more susceptible to irritation. But once you stop that irritation, they go back to their baseline.

So in that sense, it's not occupational asthma, but it would certainly irritate somebody who has asthma. In that sense, the occupation could be a contributing factor, but not a prevailing factor.[62]

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[62] *Id*. at 14-17. See also pp. 19, 61 and 70.

Dr. Parmet doubted plastics were heated at respondent's plant to the point where the chemicals would break down and decompose, but he acknowledged overheating or burning plastic could occur outside day-to-day routine.[63] He has not been to respondent's facility, but has been to other plastic plants. While Dr. Parmet agreed the heating of plastic causes irritants, such as formaldehyde, aldehydes, ketones and organic acids, he does not believe the irritants can cause irritant-induced asthma. Dr. Parmet testified, "If you have asthma and you get exposed to an irritant, your response is to have asthma. It triggers a response in somebody who's already got asthma; it doesn't cause that asthma"[64] and "[a]ny asthma going untreated long enough can produce COPD"[65] which is irreversible. Dr. Parmet did not think claimant had occupational asthma because there was no proof that a specific workplace asthma agent or antigen caused claimant's asthma.[66]

Dr. Parmet reviewed Dr. Winblad's records, but he testified he did not review Dr. Eldika's records or records concerning claimant's hospitalizations.[67] Dr. Parmet agreed it was good to have all the records, but he made his own opinions and it was his custom to "completely ignore reading opinions from other experts"[68] and that he does not "defer to anybody"[69] to render a diagnosis.

Dr. Parmet testified irritants like formaldehyde irritate people who suffer from asthma and trigger asthma attacks, but do not cause asthma. Dr. Parmet was shown and asked questions regarding the MSDS from Mr. Hubble's deposition. He testified the chemicals noted in the MSDS are respiratory irritants that cause asthmatic reactions, but no persistent asthma when the exposure to the irritants has ended.[70] Dr. Parmet agreed exposure to irritants could be a minor component in aggravating claimant's underlying and preexisting asthma, but such exposures would not be a primary cause.[71] Dr. Parmet could not say how much claimant was actually exposed to irritants.

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[63] *Id*. at 19, 83, 86-87.

[64] *Id*. at 44.

[65] *Id*. at 61.

[66] *Id*. at 91-92.

[67] Dr. Parmet may have been provided Dr. Eldika's records. His report states he reviewed Dr. Eldika's records and references Dr. Eldika's August 13, 2009 report and a January 27, 2012 letter. A report from Dr. Eldika may have been contained in the exhibits of Dr. Winblad's deposition, which Dr. Parmet reviewed. (See *Id*. at 32-33).

[68] *Id*. at 31; see also at p. 27.

[69] *Id*. at 38.

[70] *Id*. at 47-50, 64, 70, 80-81.

[71] *Id*. at 83.

In the June 25, 2014 Award, the judge concluded: (1) claimant became disabled on January 10, 2012, his last day of physical work for respondent; (2) claimant timely provided written notice of his asserted occupational disease within 90 days of his disablement; (3) claimant filed an application for hearing within one year of his disablement; and (4) claimant was not equitably estopped from seeking workers compensation benefits after receiving short term disability benefits. However, the judge further stated in part:

> Claimant testified that he was bothered by fumes at respondent's work facility. Claimant believes fumes at work caused his respiratory problems.
>
> Dr. Winblad's notes indicate that the work environment at respondent's facility caused claimant to have difficulty breathing and caused claimant's asthma to flare up. Dr. Winblad's notes state that claimant may not be able to continue working for respondent if claimant's work exacerbates his asthma. However Dr. Winblad declined to give an opinion regarding permanent disability from occupational asthma.

Dr. Leeds examined claimant at his attorney's request. Dr. Leeds' opinion is that claimant's exposure to chemicals, vapors and fumes at work caused claimant's asthma. But Dr. Leeds was not familiar with what chemicals and fumes claimant was exposed to while working for respondent.

> There is little question that fumes at respondent's facility caused claimant's asthma to become worse while claimant was in the facility. Claimant was unable to continue working for respondent for that reason.
>
> But K.S.A. 44-5a01 requires that claimant show that the asthma arise out of and in the course of employment and that claimant actually contracted asthma from working for respondent. The Court is not convinced that claimant has met his burden to show that. Dr. Leeds' did not point to any chemical or other substance in respondent's facility that caused claimant's asthma. While claimant's asthma got worse when he was in respondent's facility, that only proves that something in the facility temporarily aggravated claimant's asthma. That does not prove that the conditions in the facility caused claimant's underlying asthma.
>
> K.S.A. 44-5a01 also requires that claimant show there is a particular hazard in the employment that is in excess of the hazard of the disease in general. Claimant must show that his asthma resulted from a special risk of asthma connected with his employment. Claimant has shown that he worked around hot plastic and that there were fumes in respondent's plant. But the testing done by respondent showed that the air quality in the facility was within established standards, and there was no evidence that any other workers had developed asthma. There is not a showing by claimant that his asthma resulted from a special risk associated with his employment.

> Claimant has not convinced this Court that his asthma actually was caused by working for respondent. There is no doubt claimant's asthma was temporarily made worse during the time he was actually in respondent's facility. But this Court is not convinced that the fumes in respondent's facility caused claimant to develop asthma.
>
> The Court finds claimant did not meet with disability by occupational disease on each and every working day through January 10, 2012, and the alleged occupational disease did not arise out of and in the course of claimant's employment with respondent.[72]

Thereafter, claimant filed a timely appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by occupational disease arising out of and in the course of employment.[73] Claimant must prove his or her right to an award based on the whole record under a "more probably true than not true" standard.[74]

K.S.A. 44-519 states:

> [N]o report of any examination of any employee by a health care provider, as provided for in the workers compensation act . . . shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

K.A.R. 51-3-5a states in part:

> (a) Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing. However, the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records, or statements or unless the report, record, or statement is later supported by the testimony of the physician, surgeon, or other person making the report, record, or statement.

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[72] ALJ Award (June 25, 2014) at 14.

[73] K.S.A. 2011 Supp. 44-501b(b).

[74] K.S.A. 2011 Supp. 44-501b(c) and K.S.A. 2011 Supp. 44-508(h).

K.S.A. 2011 Supp. 44-555c(a) provides in pertinent part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

K.S.A. 2011 Supp. 44-5a01 provides in relevant part:

Occupational diseases; treated as injuries by accident under workmen's compensation act; defined; limitations of liability; aggravations. (a) Where the employer and employee or workman are subject by law or election to the provisions of the workmen's compensation act, the disablement or death of an employee or workman resulting from an occupational disease as defined in this section shall be treated as the happening of an injury by accident, and the employee or workman or, in case of death, his dependents shall be entitled to compensation for such disablement or death resulting from an occupational disease, in accordance with the provisions of the workmen's compensation act as in cases of injuries by accident which are compensable thereunder, except as specifically provided otherwise for occupational diseases. In no circumstances shall an occupational disease be construed to include injuries caused by repetitive trauma as defined in K.S.A. 44-508, and amendments thereto.

(b) "Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases . . . .

(c) In no case shall an employer be liable for compensation under this section unless disablement results within one year or death results within three years in case of silicosis, or one year in case of any other occupational disease, after the last injurious exposure to the hazard of such disease in such employment, or, in case of death, unless death follows continuous disability from such disease, commencing within the period above limited, for which compensation has been paid or awarded or timely claim made as provided in the workmen's compensation act, and results within seven years after such last exposure. Where payments have

> been made on account of any disablement from which death shall thereafter result such payments shall be deducted from the amount of liability provided by law in case of death. The time limit prescribed by this section shall not apply in the case of an employee whose disablement or death is due to occupational exposure to ionizing radiation.
>
> (d) Where an occupational disease is aggravated by any disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death, as such occupational disease, as a causative factor, bears to all the causes of such disability or death, such reduction in compensation to be effected by reducing the number of weekly or monthly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interest of the claimant or claimants.

In *Burton*,[75] Mr. Burton worked in a steel foundry and was exposed to dirt and dust. One doctor restricted Mr. Burton from working in a dusty or dirty environment, another physician could not identify an occupational cause for Mr. Burton's asthma and another physician opined Mr. Burton's asthma was due to cigarette smoking and noxious fumes and smoke in his work environment. The Kansas Supreme Court construed K.S.A. 44-5a01(d) as not requiring apportionment where a disease producing a single disability is caused by both occupational and nonoccupational factors.

In *Armstong*, a claimant was exposed to floating solids and grease of what he termed unusual color and texture while cleaning sewage.[76] He smelled a pesticide-like smell and became ill. He also alleged exposure to chemical spray from a carpet cleaning machine and chemical odors from respirators. He testified he had weakness, confusion, headaches, leg tingling, tremors, diarrhea and fatigue which were not present before being exposed to workplace substances and odors. The medical evidence was conflicting. The judge and the Board concluded Mr. Armstrong was disabled from work due to occupational chemical exposures. The Board did not identify Mr. Armstrong's diagnosis. The Kansas Court of Appeals affirmed, holding Mr. Armstrong need not prove an identifiable diagnosis or disease to receive benefits. It was sufficient that he was exposed to "something floating around in the Wichita sewer lines"[77] and became sick. The Court of Appeals also held a

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[75] *Burton v. Rockwell Int'l*, 266 Kan. 1, 967 P.2d 290 (1998).

[76] See *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 751, 907 P.2d 923 (1995), *rev. denied* 259 Kan. 927 (1996). See also *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984), in which Mr. Box had exposure to various paints and ketone thinner. Sometimes the air was so thick he could not see the other end of his department. There was evidence other employees in the same department had lung problems and the exhaust system was inadequate. It does not appear in either *Armstrong* or *Box* that the identity or concentration of what chemical caused such claimants' diseases was at issue.

[77] *Armstrong,* 21 Kan. App. 2d. at 755.

claimant alleging an occupational disease need not prove that medical evidence satisfies either the *Daubert*[78] or *Frye*[79] tests.

A more recent theme in appellate decisions regarding chemical exposure is that expert opinions should be based on fact and not speculation. The claimant in *Chriestenson*[80] alleged multiple chemical sensitivity due to her work. Ms. Chriestenson's medical expert, Dr. Ziem, evaluated her seven years after her last workplace exposure to chemicals. Dr. Ziem did not review Ms. Chriestenson's prior medical records, she did not know the quantity of chemicals to which Ms. Chriestenson may have been exposed and did not know Ms. Chriestenson's exposure to chemicals in her home life or her cigarette smoking exposure. Further, Dr. Ziem opined Ms. Chriestenson's preexisting neurological conditions were irrelevant. Instead, Dr. Ziem concluded Ms. Chriestenson was exposed to chemical concentrations at her work that must have been high enough to cause her symptoms. The Kansas Court of Appeals determined such evidence was not competent because it was *post hoc, ergo propter hoc* logic – just because symptoms follow an exposure does not mean the symptoms are due to the exposure.

In a civil case, *Kuxhausen*,[81] the Kansas Supreme Court rejected a plaintiff's expert medical opinion that the plaintiff's multiple chemical sensitivity diagnosis was due to exposure to a paint, chemical or contaminant at work. The decision states:

> In this case, Dr. Kanarek's opinion is ultimately based on nothing more than *post hoc ergo propter hoc* logic: the symptoms follow the exposure; therefore, they must be due to it. Such reasoning is nothing more than speculation. Dr. Kanarek's examination of the plaintiff and the medical tests done on her revealed no abnormalities. He had no data concerning the level or amount of chemicals to which Kuxhausen was exposed or the mechanism of exposure. He testified only that there were materials listed on the MSDS that can make people sick and lead to health problems. He provided no supporting basis for concluding that those substances did make Kuxhausen sick in this case. This evidence affords no reasonable basis for the conclusion that Kuxhausen's symptoms more likely than not resulted from the defendant's conduct. In other words, Dr. Kanarek's causation opinion is totally lacking in a factual basis.[82]

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[78] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 125 L.Ed. 2d 469, 113 S.Ct. 2786 (1993).

[79] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[80] *Chriestenson v. Russell Stover Candies*, 46 Kan. App. 2d 453, 263 P.3d 821 (2011), *rev. denied* 294 Kan. 943 (2012).

[81] *Kuxhausen v. Tillman Partners, L.P.*, 291 Kan. 314, 241 P.3d 75 (2010).

[82] *Id*. at 320-21. Of note, the "role of the expert medical witness in workers compensation actions has never been elevated to the role it plays in civil actions" and medical testimony is not needed to establish a disability. *Armstrong*, 21 Kan. App. 2d at 755-56.

Kuxhausen, while a civil case with technical rules of evidence not applicable to workers compensation claims, was favorably cited in *Chriestenson*: (1) "[n]evertheless, a claimant in a workers compensation case has the burden to show a causal connection between a disease or condition and his or her employment" and (2) "the requirement that causation in a workers compensation case must be based on substantial evidence and not on mere speculation."[83]

Ribeau[84] is a case where a claimant alleged harmful exposure to nuts, nut oil and metrin (soybean) oil. Several physicians opined Ms. Ribeau had a workplace nut or nut oil allergy based on her self-reported and uncorroborated exposures and reactions. However, skin and blood testing were negative for nut allergies. The Board affirmed the judge's denial of benefits based on claimant having failed to prove her allergy actually existed. The Kansas Court of Appeals stated:

> [T]here is substantial evidence supporting the Board's factual finding that Ribeau failed to prove the existence of an injury, i.e., a peanut and nut allergy. All of the objective testing performed—the blood test administered by Dr. Baker in December 2008, the skin tests and blood tests administered by Dr. Stechschulte in June 2009, and the skin test administered by Dr. Madril in December 2009—came back negative for allergy to peanuts, nuts, metrin oil, or any other allergy.
>
> . . .
>
> On the other hand, Dr. Baker, Dr. Madril, and Dr. Murati all diagnosed Ribeau with a peanut and nut allergy based on her self-reported history of exposures and reactions. However, there is nothing in the record to corroborate Ribeau's history except her own testimony.
>
> . . .
>
> Turning to the Board's factual finding that Ribeau failed to prove a causal connection between the alleged allergy and her work at RSC, the record as a whole supports this conclusion. Ribeau admitted she had been exposed to peanuts and nuts outside of RSC throughout the course of her life. Furthermore, the record contains no evidence about the quantity and quality of Ribeau's exposure at RSC, aside from generic statements that there was nut dust in the plant and one comment by someone at RSC that Ribeau could not totally avoid exposure to peanuts and nuts even by wearing a protective mask and gloves.[85]

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[83] *Chriestenson*, 46 Kan. App. 2d at 460.

[84] *Ribeau v. Russell Stover Candies*, No. 110,533, 2014 WL 4258297 (unpublished Kansas Court of Appeals opinion filed Aug. 29, 2014).

[85] *Id.*, slip op. at 13-14.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[86] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of claimant and any other testimony relevant to the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[87]

ANALYSIS

Claimant's theory of recovery is he developed occupational asthma (which then led to COPD) as a consequence of exposures to various chemicals in his work for respondent. Claimant, not respondent, carries the burden of proof.

Claimant posits that:

- he worked around resins that were heated to 400°;
- Mr. Hubble of respondent was unaware resins heated above 350° can release vapors and gases;
- MSDS for the polyethylene resin shows if it is heated above 350°, vapors and gases can be released and such vapors or gases may contain acetaldehyde, acetone, acetic acid, formic acid, formaldehyde and acrolein;
- MSDS for the polyethylene resin shows if it is heated above 350°, polymerized olefins in Marlex can release vapors and gases, such as aldehydes, ketones and organic acids, which irritate the mucous membranes of the eyes, mouth, throat and lungs;
- his lungs were clear and he had no allergies based on a physician assistant's evaluation in January 2003, but the same physician assistant diagnosed claimant with asthmatic bronchitis a year later and other individuals in Dr. Winblad's office diagnosed claimant with asthma;
- therefore, his asthma must be from occupational exposure to vapors and gases at work.[88]

The Board agrees with the Award's finding that claimant did not sustain his burden to prove an occupational disease.

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[86] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[87] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 *rev. denied* 249 Kan. 778 (1991).

[88] See Leeds Depo. Ex. 5 at 1.

Claimant did not prove his asthma and resulting COPD arose out of and in the course of his employment. He did not meet his burden to prove he contracted such diseases on account of his work. Claimant's testimony that he saw vapors and smelled odors is insufficient to establish causation, nor does the fact he was diagnosed with asthma while he worked for respondent or respondent's knowledge claimant used a breathing machine in his car at work. Mr. Hubble's lack of knowledge as to the possibility of chemical exposures based on the temperature of machines does not establish claimant was exposed to such chemicals or that such chemicals caused his asthma.

The evidence does not establish the extent or frequency of claimant's alleged chemical exposures. Claimant did not prove his employment for respondent exposed him to a particular and peculiar hazard of developing asthma that distinguishes such employment from other occupations and employments, and which creates a hazard of such disease in excess of the hazard of such disease in general. Claimant did not prove the disease had its origin in a special risk of such disease connected with his particular type of employment or that it resulted from that source as a reasonable consequence of the risk. He further did not prove his asthma was anything more than an ordinary disease of life and conditions to which the general public is or may be exposed to outside of the particular employment. The evidence does not specifically link asthma with the chemicals and other substances to which claimant says he was exposed.

Claimant's assertions his case is compensable based on case studies concerning "meat wrappers'" or "paper wrappers' asthma" or a Korean plastics worker dying after an asthmatic attack are of questionable significance. No expert indicated claimant has meat wrappers' asthma, paper wrappers' asthma or was exposed to workplace conditions similar to those of the deceased Korean worker.

Dr. Winblad's February 13, 2008 report noting claimant was exposed to some plastics is not commentary on causation. Physician assistant Ward's July 13, 2011 note that claimant cannot breathe while working in extreme heat and with plastic fumes is not commentary on causation.

Claimant refers to the opinions of Dr. Eldika, a physician who did not testify. K.S.A. 44-519 excludes opinions not supported by a health care provider's testimony. A physician's reliance upon a medical record authored by a non-testifying physician does not make the non-testifying physician's opinion admissible.[89] "The workers compensation system has been well served by requiring the opinions of experts to be based on testimony subject to cross-examination, and if this is to be changed, we believe the legislature should do so and not this court."[90] While K.S.A. 44-523(a) disfavors "technical rules of evidence," K.S.A. 44-519 is a specific legislative mandate that must be followed.[91]

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[89] *Brady v. State of Kansas*, No. 1,050,052, 2011 WL 2185267 (Kan. WCAB May 6, 2011).

[90] *Roberts v. J. C. Penney Co., Inc.*, 263 Kan. 270, 282, 949 P.2d 613 (1997).

[91] *Id.* at 278.

Based upon K.S.A. 44-519, *Roberts*, *Enloe*[92] and K.A.R. 51-3-5a, Dr. Eldika's opinions are excluded from the evidence. The judge stated he would not consider doctor's opinions absent their testimony.[93] Additionally, claimant did not appeal the judge's ruling to exclude Dr. Eldika's records and opinions.

Dr. Leeds' opinions are based on non-verifiable assumptions. Dr. Leeds acknowledged he was "assuming"[94] extensive workplace chemical exposure. Dr. Leeds did not know what chemicals, vapors, fumes or irritants claimant may have been exposed to or the concentration of any such chemicals, vapors, fumes or irritants. Dr. Leeds' opinion is premised on the belief that the "record" established claimant was exposed to multiple chemicals, vapors and fumes, and that any such chemicals, vapors and fumes could cause claimant's condition, which could be progressive and could be exacerbated by further exposures. However, according to Dr. Leeds, the "record" was "Work at the Rubbermaid plant."

Respondent is correct that Dr. Leeds' testimony is distilled to the "assumption that claimant was exposed to some type(s) of chemicals at Rubbermaid that were the type that could cause exacerbations of a respiratory condition if they were at sufficient levels . . . [and] that since claimant was exposed to chemicals, fumes and dust during his employment, such exposure caused him to develop asthma."[95] Dr. Leeds even acknowledged this is the sort of *post hoc, ergo propter hoc* logic denounced in *Kuxhausen* and *Chriestenson*. Dr. Leeds' opinions are similar to the rejected opinions of Dr. Kanarek in *Kuxhausen* and Dr. Ziem in *Chriestenson*.

Claimant did not sustain his burden to prove the elements required to establish a compensable occupational disease under K.S.A. 2011 Supp. 44-5a01.

CONCLUSIONS

1. Claimant did not sustain his burden to prove he suffers from an occupational disease.

2. Consequently, all other issues are moot and will not be addressed.

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[92] *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 130-31, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989).

[93] R.H. Trans. at 12. The parties agreed Dr. Eldika's opinions, absent being properly placed into evidence, would not be considered as evidence. (See *Id*. at 46). The parties did not secure Dr. Eldika's testimony or stipulate such physician's records into evidence. Claimant cites Dr. Eldika's opinions [see Claimant's Brief on Appeal of the Award Entered by Administrative Law Judge (filed July 28, 2014) at 6 and Claimant's Reply Brief on Appeal of the Award Entered by Administrative Law Judge (filed Sept. 3, 2014) at 5], but they are not in evidence.

[94] Leeds Depo. at 24.

[95] Respondent's Response Brief to the Appeals Board (filed Aug. 20, 2014) at 9.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[96] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the June 25, 2014 Award.

IT IS SO ORDERED.

Dated this _____ day of November, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Gary K. Jones

[96] K.S.A. 2011 Supp. 44-555c(k).